Please Don't Read the Title

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I. SYSTEMS

Amy and Jake are playing Monopoly (capital *M*). They form a very small system, which comprises two players, a short set of rules, and a limited sphere of activity. Any deviation from these three components of the system constitutes a move outside the system. If, for example, Amy's parents are playing Monopoly in the next room, they form a different system (a very similar one, but a different one). If Amy and Jake agree to add new rules to the game, they move outside the system. (If they wish to make the game more accurately reflect the current transportation market by building hotels over the railroads, for instance, we would hesitate before calling the resulting system "Monopoly").[1] And likewise, they transcend the system when they perform activities outside the delimited sphere. If Amy invites Jake to the soda shop, she has stepped into a very different system, with a whole new (and much more ambiguous) set of rules.

Consider a much larger system. Carl Icahn is playing monopoly (small *m*). The universe of players includes the managers and employees of Target Corporation; Target Corporation's shareholders; employees, managers, and shareholders of various financial institutions; a large number of government employees; scores of lawyers; and many, many others. It is still a small group, however, compared to the population as a whole; a list of the nonplayers (Darryl Strawberry, Madonna, the Dalai Lama, etc.) would be much longer. The set of rules is very large; it includes antitrust rules, tax rules, securities rules, corporations rules, and so on. This is why Carl Icahn needs those lawyers while Amy and Jake do not. Finally, the delimited sphere of activity is large. The players have moves available to them which Amy and Jake, even at their most reflective, would never be able to dream up. But again, the set of moves is smaller than the set of nonmoves; if Carl Icahn plays the saxophone before he goes to sleep at night, he has stepped outside of the system.

Now consider an even larger system. The legal system includes a vast number of players. It is a point of pride among the system's champions that *everyone* is a player, that no one is entitled to withdraw from the system by living according to a different set of rules.[2] The system comprises a vast number of rules—in fact, all the rules. Nearly every life situation has a rule to cover it, and the system generates new rules when an old one is lacking or insufficient. And finally, the system covers a vast sphere of activity. It probably covers *all* activity, in that the activities which the

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1. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 138–39 (1961) (noting that if we change the rules of a game in order to put scoring completely within the discretion of the scorekeeper, it becomes a different game).

2. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 712–13 (1974); Prince v. Massachusetts, 321 U.S. 158, 165–67 (1944).

system may not cover are protected from coverage by a different rule within the system itself.[3]

I would like to view the world, at least for the moment, as being made up of an infinite number of loosely-organized overlapping systems.[4] Each system has three defining characteristics: a group of players, a set of rules, and a delimited sphere of activity. While these characteristics define the system, they need not themselves be defined with any degree of precision. The lines between a player and a nonplayer, between a rule and a nonrule, and between a move within the system and a move outside the system will usually be fuzzy once we move beyond a trivial Amy-and-Jake example. The content of a system may be fuzzy, but the concept of a system need not be.

II. JUMPING ONCE

My favorite statute is section 2 of the California Evidence Code, which appears under the general title "Preliminary Provisions and Construction." Section 2 reads, in relevant part: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code."[5] Think about this for a minute. Section 2 announces a rule that portions of the Evidence Code in conflict with the common law are to be liberally construed. But section 2 is thus itself in conflict with the common law, and should therefore be strictly construed. Section 2 is a self-interpreting statute; its text provides an interpretation of itself at odds with what would otherwise be the conventional interpretation. It is a statute which attempts to jump outside of itself to comment on itself: "Rules for interpreting statutes have no application as to me."

The question of how to interpret section 2 is superficially easy. If we take the statute's self-construction at face value, we can construe it liberally and be done with it. But it is not obvious that a statute should have the final word on how it is to be interpreted, particularly if its self-interpretation tries to negate a standard interpretive rule.[6] For example, if section 3 of the California Evidence Code read: "Section 3 should be construed as if it were part of the United States Constitution," it is a safe bet that this sort of self-construction would be ignored. If section 4 read: "The California Evidence Code shall be interpreted so as to apply to trials involving California residents conducted in other states," such a self-interpretation would

3. For example, Congress can make no rules abridging the freedom of speech. We thus have an activity—the freedom of speech—which the system may not cover. But the first amendment is itself part of the legal system; if the legal system does not contain speech-abridging rules, it is only because it *does* contain an anti-speech-abridging rule.

4. *See generally* D. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 33–41, 285–309, 465–79 (1979). These informal systems are somewhat analogous to formal mathematical systems (composed of axioms, theorems, and derivation rules), but the analogy clearly cannot be carried very far. When you go too far with the analogy, you become dangerously Langdellian. *See* Stone-de Montpensier, *Logic and Law: The Precedence of Precedents*, 51 MINN. L. REV. 655 (1967) (treating the legal system as if it were a formal system, with silly results). "[W]e may remark that the law proceeds from justice, not to it, and that if a teleology abandons logic for justice as a foundation of a legal system for a goal justifying a set of rules, then systems of law in Common Law countries will come to resemble the nightmare of Kafka's trial." *Id.* at 674.

5. CAL. EVID. CODE § 2 (West 1989).

6. On who is responsible for these interpretive rules, see *infra* notes 23–27 and accompanying text.

similarly not trump other rules of interpretation.[7] A rule's attempt to interpret itself thus need not be accorded any particular deference.[8]

If we construe section 2 liberally, it wriggles out from under the common law rule, and it should therefore be construed liberally. If we construe it strictly, it remains trumped by the common law, and it should therefore be construed strictly. It is unfortunate (although fortunate for California litigants) that the common law rule and the statute do not go in the opposite directions. If the common law rule said to interpret statutes in derogation of the common law liberally, and the statute said to interpret itself strictly, we would confront a perfect replica of the Liar's Paradox.[9] If we interpreted the statute strictly (by letting the common law trump it), we would have to interpret the statute liberally. If we interpreted the statute liberally (by letting it trump the common law), we would have to interpret it strictly.

The point of all this, which may be getting a little obscure, is not that section 2 of the California Evidence Code should be interpreted one way or the other. I cite it only as an example of a text attempting to stretch its own boundaries, to become a meta-text which can comment on the text (which is itself).[10] While it is the most interesting example I have come across, it is certainly not unusual. Many statutory schemes contain guides to their own interpretation.[11] If the underlying statutes are thought of as first-order rules, the interpretive provisions are meta-rules, providing rules for rule-manipulation. In a stautory scheme of sufficient complexity, there is no reason why we could not have meta-meta-rules, providing rules for the interpretation of the meta-rules (California Evidence Code section 2A: "Section 2 should be construed strictly."). This could go on forever.

The rules within the California Evidence Code are the rules of a system called California Litigation. The players are judges, lawyers, litigants, and so on. The sphere of activity is litigating. When you are in court, you are *doing* litigation. You are in the system. When you are in the library writing about litigation, you are

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7. In one of those all-too-rare blends of theory and practice, non-self-interpretation has nearly become the official view of the Reagan Justice Department. *See* L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 141 (1987), quoting Brief for the United States as Amicus Curiae in Support of Appellants at 24; Diamond v. Charles, 476 U.S. 54 (1986) (No. 84-1379), Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (No. 84-495) ("There is no explicit textual warrant in the Constitution for a right to an abortion. It is true, of course, that words, and certainly the words of general constitutional provisions, do not interpret themselves.").

8. On the other hand, if we are going to defer to a text's self-interpretation, I would like this text to include the following interpretive guidelines: (A) Any weak arguments are to be considered persuasive; (B) Any awkwardness in sentence construction is to be interpreted as representative of an idiosyncratic but engaging prose style, not incompetence; and (C) Any ambiguity is to be resolved in favor of the interpretation with which the reader is most in agreement.

9. In the classic version of the Liar's Paradox, Epimenides, a Cretan, declares "All Cretans are liars," in the sense that everything ever said by a Cretan is false. If the statement is true, it is false (because said by a Cretan); if it is false, it is true. A simpler version consists of the statement "This statement is false." The paradox has occupied logicians for over two thousand years. *See, e.g., Titus* 1:12 ("One of themselves, even a prophet of their own, said, The Cretans are always liars."). *See generally* THE PARADOX OF THE LIAR (R.L. Martin ed. 1970); Hicks, *The Liar Paradox in Legal Reasoning*, 29 CAMB. L.J. 275 (1971).

10. Whether or not such a self-interpreting statute has *any* meaning is a more fundamental question, which I am not considering here. *See* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 170–78 (1983) (a self-referring law is not meaningless so long as it also refers to other laws); Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1 (1969) (self-reference, whether direct or indirect, total or partial, deprives a statute of meaning).

11. *See, e.g.*, 42 U.S.C. § 4331 (1982) (Congressional declaration of national environmental policy); 42 U.S.C. § 280b (1982 & Supp. IV 1986) (Congressional declaration of policy regarding assistance to medical libraries).

interpreting litigation. You are in a meta-system, which can describe, interpret, and comment on the underlying system, which is litigation. This can go on forever as well. Many of the people in the library are not doing litigation (they are not in the system), or even interpreting litigation (they are not in the meta-system). They are instead writing about, commenting on, and interpreting the literature which has been written about litigation. They are in a meta-meta-system. Much of the law review literature comments on debates about debates about the legal system; if the legal system is the base system, the articles are meta-meta-meta-commentary, requiring a knowledge of at least three levels of discourse in order to be comprehensible.[12]

Self-interpreting statutory schemes are attempts to jump out of a system into a meta-system. When a statute prescribes its own interpretation, it simultaneously declares "I am a statute" and "I am a meta-statute." The question of whether the attempt to jump out of the system can succeed is one which we will get back to later.

III. Small Jumping

Jumping out of the system is not a phenomenon unique to self-interpreting statutes. It is closer to being the ordinary stuff of the legal world.[13] What follows is a quick nonexhaustive summary of some areas where attempts to jump the system are continually being made.

A. *Jurisdiction*

Judge *A* has a case before her. Before she can be permitted to decide who should win, a meta-decision needs to be made: Is Judge *A* the correct decider? Forget your legal training and consider this question in the abstract. If we were to comb the population, looking for candidates to make the meta-decision, Judge *A* would appear

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12. The identification of the levels of debate is an interesting exercise. Here is an example, based on a legal issue picked at random (honest). In State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971), the New Jersey Supreme Court held that ownership of land does not include the right to bar access to governmental services available to migrant workers living on the land. Here we go:

Level 1—the briefs in the case, filed by Camden Regional Legal Services and the State of New Jersey.

Level 2—Note, *Representatives of Federal and Local Service Organizations Granted Right of Access Onto Farmer-Employer's Property to Communicate with Migrant Workers*, 46 N.Y.U. L. Rev. 834 (1971) (claiming the case to be a valuable precedent); Note, *Granting Poverty Workers Access to Farmworkers Housed on Private Property*, 25 Sw. L.J. 780, 787 (1971) (accusing the court of having used "peculiar reasoning" in deciding the case).

Level 3—Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 626–31 (1982) (mentioning *Shack* as an example of the tension in private law between freedom of contract and paternalism, and generally siding with paternalism); C. Fried, Contract as Promise 20–21 (1981) (equating paternalism with disrespect for others).

Level 4—Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763 (1983) (breaking up the paternalism-contractual freedom debate into three areas of moral principle); Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611 (1988) (treating paternalism and freedom of contract as instances of a more general debate as to the nature of property ownership).

13. And not just the legal world. For a non-legal example of jumping out of a system in order to comment on the system, see Pear, *An Average Reader Finishes This Article In About 2 1/2 Minutes*, N.Y. Times, Mar. 8, 1988, at A1, col. 1. The article describes Internal Revenue Service efforts to determine how long taxpayers spend filling out tax forms. The article continues at page A21, column 1; the jump headline reads "You Have About 2 Minutes Left." *See also* Moser, *This Is the Title of This Story, Which Is Also Found Several Times in the Story Itself*, in D. Hofstadter, Metamagical Themas: Questing for the Essence of Mind and Pattern 37–41 (1985) (a short story consisting entirely of self-referential sentences); R. Smullyan, This Book Needs No Title: A Budget of Living Paradoxes (1980).

to be very poorly qualified. After all, she is the one who will be making the underlying decision. If she claims a right to make the determination that she is the correct decider, her claim looks suspiciously like a bald assertion of decisionmaking power. (When Amy, Jake, and a group of their friends play tag after school, and Jake unilaterally claims the power to resolve disputes, his claim will be a good deal less credible than if the participants had agreed beforehand to designate Jake as the dispute-resolver.)

The dilemma here is obvious. We could let Judge *B* make the meta-decision as to the jurisdiction of Judge *A*, but how would we know Judge *B* was the right meta-decider? At this point, we introduce Judge *C*, Judge *D*, and so on, until we have exhausted the alphabet and the office space in the courthouse. The only solution is to cut off the infinite regress at the beginning, by collapsing all the levels of meta-decision back into the self-referential decision of Judge *A*. Judge *A* becomes both decider and meta-decider (and meta-meta-decider, all the way up to infinity). She makes first-order decisions *herself*, and second-order decisions *about herself*. Similar meta-decisionmaking comes about regarding other threshold issues, such as justiciability, standing, ripeness, mootness, and so on.[14]

B. *Recusal*

The problem of the infinite ladder of meta-decisionmakers is even more pronounced when one of the litigants wants to disqualify Judge *A* because she is biased. Now Judge *A* looks even less qualified to make the meta-decision. If she really is biased, she will claim not to be biased. She will only admit to being biased if she is not biased, but thinks that onlookers will think she is biased. The situation cries out for Judge *B*, who, unlike Judge *A*, is unbiased regarding the issue of Judge *A*'s bias. But how can we be sure? Maybe Judge *B* has always harbored a grudge against Judge *A*, and sees his chance to get even. Once again, we trot out Judge *C*, Judge *D*, and the rest of the meta-bench. And once again, this goes on to infinity. We collapse the chain of meta-judges back into Judge *A*, who gets to make the meta-decision as to whether she is sufficiently free from bias to make the underlying decision.

As in determinations of jurisdiction, the underlying case before the court constitutes a system. The decision as to who should decide the case is a jump outside of the system. It is a move up to a level *outside* the system, at which one makes decisions *about* the system. Judge *A* is thus operating on two levels. She makes decisions within the system (such as evidentiary rulings) and decisions about the system. Like a self-interpreting statute, she is both text (system) and reader (meta-system).

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14. For the last word on infinite regress, see Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 937–44 (1988). *See also* DR. SEUSS, THE CAT IN THE HAT COMES BACK (1958) (where the last word is "Voom").

C. *Oaths*

A witness is going to make a statement. We want to ensure that the statement is true, so we have the witness swear as to the statement's truth.[15] The oath is a meta-statement; it is a statement about a statement. We have satisfied ourselves as to the first level. If the meta-statement was true, the statement will be true. But what if the witness was lying when he made the oath? We could require a meta-oath, attesting to the truth of the oath, but that way lies madness. Instead, we are content with one level of oath.

A number of legal formalities follow the same pattern. We verify complaints—if the complaint is fraudulent, the verification can be fraudulent as well. We notarize documents—if the signer is a crook he can pay off the notary. We sign income tax returns below a legend stating that the return and its accompanying schedules "are true, correct, and complete"[16]—one can only speculate as to how often this recitation prevents tax fraud. But there is no choice. We could meta-verify complaints by verifying the verification, or meta-notarize documents by notarizing the notary's signature, but we halt the infinite regress after going up one level. As a result, the witness jumps outside of his testimony-system by first speaking *about* his testimony. The taxpayer jumps outside of his role to become a meta-taxpayer, providing information not just *in* his return but *about* his return.

D. *Judicial Selection*

Judicial selection procedures are the most generalized instances of the issue discussed above with reference to jurisdiction and recusal, namely that of deciding who the decider is to be. We confront the same infinite chain of meta-deciders. We could let *B* decide whether *A* is to be a judge, but then *C* would have to make the meta-meta-decision about *B*'s competence, and so on. Here, the problem is handled in two ways. Neither of them replicates the solution for jurisdiction and recusal; we do not collapse the chain back into *A* and let *A* set herself up as a judge on her own initiative. Instead, we either (1) cut off meta-decisionmaking at Level 2, by giving *B* (the Senate, the Governor) final authority to appoint *A, or (2) put it up to a vote.*[17] *(A popular vote could be thought of as placing "the people" in the position of B*, the meta-decider, and foreclosing resort to higher levels, but it seems more accurate to say that when the meta-decision is made by popular vote, *no one* is the meta-decider. There is no *B.)*

Does the presence of a meta-dec.ider make for fairer judging? Does a meta-statement (an oath) give any additional assurance of truth that was not already contained within the system itself? Does Judge *A*'s meta-decision as to bias add any

15. *See, e.g.*, FED. R. EVID. 603 ("Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.").

16. Internal Revenue Service, Form 1040 (1988).

17. *See generally* Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988). Although I am citing myself, this note, unlike note 37, *infra*, is *not* self-referential.

safeguard against bias which was not already present within the system? Does statutory self-interpretation provide any extra interpretive guidance beyond what we already had? I doubt it. The attempt to jump outside the system fails in each of these instances. When we try to jump outside the system, we land right back in it again; we are still within the California Evidence Code, Judge *A* is still on the bench, the same witness is still testifying, and the taxpayer is still being depended on for the same information.[18]

IV. Big Jumping

The specific instances of system jumping examined above fall into two general categories. In the first, players within the system attempt to find a meta-authority to resolve disputes about the nature of first-level authority. In the second, authors attempt to write meta-directives, to foreclose interpretive disputes about the first-level directives. Before discussing these two categories, we should generalize even further, and discuss system jumping from the legal system as a whole.

A. *Meta-systems*

So far, we have been treating the characteristics of a system as preordained. When Amy and Jake play Monopoly, they take the rules as given. But what happens when they become dissatisfied with the rules (Amy wants to redistribute the bank's wealth to the players; Jake wants to abolish the Luxury Tax)? What arguments could a proponent of the rules as they currently exist use to defend them? There are two options. First, a system-defender can treat the rules as immutable, as first principles from which there can be no deviation. In mathematical terms, the rules would be axioms, not theorems; the rules would be unprovable, but logically necessary in order to play the game.

The second option is more interesting. A system-defender could try to justify the existence of a rule by positing the rule as logically necessary within the context of a meta-system. Jake could defend the non-redistribution rule by locating it within meta-Monopoly, a game in which each player attempts to choose the most advantageous rules for an ensuing game of Monopoly. He would argue that a rational meta-Monopoly player would choose to keep the wealth of the players separate from that of the bank. Amy could similarly justify the Luxury Tax as the rational meta-Monopolist's counterweight to the tax-free two hundred dollars each player receives upon passing Go, only two squares later. (Note that meta-Monopoly also gives Amy and Jake a position from which to *criticize* rules as well. We'll get back to this in a minute.)

Particular rules in the legal system are also justified by reference to their logical necessity (or desirability) in a meta-legal system, a system for deciding what the rules

18. I have not forgotten the most obvious ladder of meta-systems, the hierarchy of appellate courts. We can always check the correctness of court decisions by providing for appeals, "but this must end somewhere in a final, authoritative judgment, which will be made by fallible human beings and so will carry with it the same risk of honest mistake, abuse, or violation." H.L.A. Hart, The Concept of Law 139 (1961).

of the legal system should be. Much of the history of jurisprudence can be seen as the elaboration of a series of meta-legal systems, each with the capacity to justify or criticize aspects of the underlying legal system. Langdellian conceptual neatness,[19] economic efficiency,[20] neutral principles,[21] and moral philosophy[22]—are meta-systems with respect to concrete legal rules. Each is a set of rules for determining the worth of a particular legal rule. Debates over rules, in the classroom and in the literature, tend to consist largely of warring meta-systems. I say Rule *X* is good because it is efficient, you say it is bad because it is out of kilter with other rules covering similar subjects; Jake likes it because it was formulated in a neutral manner, Amy thinks it is unjust. We all agree, however, on one point. We all implicitly believe that we can determine the value of a rule within the system by resort to a meta-system; our disagreement is over what that meta-system should look like.

B. *Meta-authority*

The instances of system jumping regarding jurisdiction, recusal, and judicial selection are particular examples of a general search for a meta-authority to resolve disputes about who should exercise authority. A number of people have spent a fair amount of their time searching for the pot of gold at the end of the hierarchy of meta-authority, the one final decider who can give order to the chain of deciders below. This final meta-authority has appeared in a number of forms: God,[23] the people,[24] the grundnorm,[25] the rule of recognition,[26] the interpretive community,[27] and so on. All are attempts to place a stable ceiling over what would otherwise be an infinitely high chain of meta-authority.

C. *Meta-directives*

The third broad category of system jumping consists of texts which purport to contain rules for their own interpretation. Such texts can be either directly self-interpreting, as is section 2 of the California Evidence Code, or indirectly self-interpreting, as is the case with any of the zillions of statutory provisions which begin "It is the intent of the Legislature to encourage such and such and the Such and Such Act should thus be interpreted in light of this goal."[28] In the latter instance, the text disclaims any self-interpretation. It claims to present something different, a text plus a message from the author guiding the text's interpretation. There is, of course, no real difference here. Section 2 of the Evidence Code did not actually write itself;

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19. *See, e.g.*, C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (1880).
20. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986).
21. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
22. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
23. *See, e.g.*, II BASIC WRITINGS OF SAINT THOMAS AQUINAS 765–66 (A. Pegis ed. 1945).
24. *See, e.g.*, THE FEDERALIST No. 38, at 259–61 (H. Dawson ed. 1864).
25. *See* H. KELSEN, PURE THEORY OF LAW 193–214 (1967).
26. *See* H.L.A. HART, THE CONCEPT OF LAW 92–93, 102–07 (1961).
27. *See* Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 552–55 (1982).
28. *See supra* note 11.

it is also a message from the author. But the underlying text (the Evidence Code minus section 2) is *also* a message from the author. The interpretive provision's claimed privileged status ("Those words are a disembodied text, but I'm more; I'm the author speaking directly to the reader-interpreter.") is a sham. When you read the California Evidence Code you do not have the Legislature reading over your shoulder, guiding your interpretation. (Count your blessings here.) All you have is one big text; indirect self-interpretation is no different than direct self-interpretation.

This is not to say that a text cannot carry *implicit* interpretive messages, meta-directives which are not part of the text itself.[29] Any text includes a few basic meta-directives. This paper, for instance, instantly conveys the message "I am in English." The fact that it has been printed on a letter-quality printer indicates that it should not be interpreted as one might interpret a shopping list or a love letter. Even to someone unfamiliar with the English language and with 1988 American conventions regarding handwriting versus printing, the ordering of symbols on the page unmistakably conveys the message "I am a message." A visitor from outer space would most likely not take this paper to be a random collection of black marks on a white surface. (Readers with a little specialized knowledge, however, may have their own opinion.)

Legal texts carry implicit meta-directives which are more distinctly legal. The location of the text conveys a crucial interpretive message; two otherwise identical texts, one appearing in the *United States Reports* and the other in *The American Lawyer*, will receive very different interpretations. Even two identical texts within the *United States Reports*, one appearing as a majority opinion and the other as a dissent, will be treated very differently. This difference does not stem from anything inherent in the text itself. The fact that the text of the majority opinion contains the words "majority opinion" and the dissent contains the word "dissent" does not itself cause the interpretive difference. It is the location of the texts which causes the interpretive difference; a dissent which demanded to be interpreted as a majority opinion would not be so interpreted, no matter how vociferous its attempt at self-interpretation.

These sorts of implicit meta-directives are what I am *not* talking about. (Both this sentence and the preceding one are self-referential—they jump out of themselves to comment upon themselves—but while this sentence is true, the preceding one is empirically false.) What I *am* talking about are explicit textual meta-directives, attempts by a text to foreclose interpretive disputes by determining its own interpretation in advance. In so doing, a text tries to become its own reader. It tries to convey and interpret information simultaneously.

V. LANDING

It may be obvious by now that all this system jumping is not putting us in any better of a position. When you jump from a system into a meta-system, it is easy to forget that the meta-system is itself a system, with its own meta-system, which in turn

29. *See* D. HOFSTADTER, *supra* note 4, at 166–76.

has *its* own meta-system, and so on. Each of the three categories gets caught in an infinite regress of system jumping, which collapses back into the first-order system. As a result, when we try to jump out of the system, we land right back in the system again.

A. *Meta-systems*

Let's settle, for the moment, on a meta-system of economic efficiency, which we will use to justify the existence or nonexistence of any particular legal rule. Jake says we are nearly finished; all that remains is the situation-by-situation application of the meta-system to each of the rules and nonrules of the system. Amy, however, correctly points out that we've only just begun. We have formulated only one rule (If a legal rule is efficient, it is good) of what will surely be a many-ruled meta-system.

The debate begins. Amy proposes Rule 2: An efficient rule which has the effect of killing more than *X* number of people is bad. She proposes Rule 3: In cases where equally plausible efficiency arguments can be made for two competing rules, the rule with more of a rich-to-poor redistributive effect is the better one. And Rule 4: The efficiency of a rule change is not to be measured by holding all other rules constant, but by making all other desired rule changes at the same time. At this point, Jake must resign himself to a long argument. Amy and Jake are going to have differing ideas as to the components of the meta-system. Each will argue for his or her own meta-rule and against the meta-rule proposed by his or her opponent. And each will need to justify his or her argument by resorting to a meta-meta-system.

It is irrelevant that the meta-meta-system may also be called "economic efficiency" (or more properly, "meta-economic efficiency"). Jake can argue for the efficiency of a particular meta-rule, but must base the argument on an economic efficiency meta-meta-system whose rules will be the subject of an identical debate. The rules of the meta-meta-system, in identical fashion, must be justified by resorting to the economic efficiency of the next highest level, and so on. Even when Amy and Jake are both economists, this is a debate which will never end.

But Amy and Jake are not computers. They recognize the infinite regress in which they are caught.[30] They do not even try to ascend the levels of debate. Instead, they confine themselves to a first-order system. If Amy likes a rule but Jake does not, they will each resort to second-order economic efficiency arguments (you never know, sometimes it works),[31] but each must acknowledge that the chances of

30. *See id.* at 36–38 (noting that a basic difference between people and machines is the ability to jump out of a system, to simultaneously do something and make observations about what one is doing). "If you punch '1' into an adding machine, and then add 1 to it, and then add 1 again, and again, and again, and continue doing so for hours and hours, the machine will never learn to anticipate you, and do it itself, although any person would pick up the repetitive behavior very quickly." *Id.* at 36–37.

31. *See* L. CARROLL, *Alice's Adventures in Wonderland*, in THE ANNOTATED ALICE 156 (M. Gardner ed. 1960):

> At this moment the King, who had been for some time busily writing in his note-book, called out "Silence!" and read out from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"
>
> Everybody looked at Alice.
>
> "*I'm* not a mile high," said Alice.
>
> "You are," said the King.
>
> "Nearly two miles high," added the Queen.

convincing the other to change his or her mind are small. In the end, the existence of the legal rule will depend more on whether or not there are more Amys than Jakes, and whether or not there are more Amys than Jakes in positions of power, than on the ability of either Amy or Jake to persuade the other that the existence or nonexistence of the rule is logically necessary with reference to the meta-system.[32]

B. *Meta-authority*

In small systems, it is easy to find a meta-authority. When Amy and Jake return to their game, any disputes about the nature of authority within the game can be resolved by resorting to anyone outside the game. Jake's mother, Amy's older brother, the school psychologist—anyone will do. As the system gets larger, it becomes harder and harder to find a meta-authority, because more and more people are already included within the system. Just as Amy and Jake's participation renders them unqualified to resolve disputes about the nature of authority within the Monopoly game, participants in a larger system are unlikely to agree on a fellow participant to serve as meta-authority. (If Judge *A* is a participant in Carl Icahn's monopoly system by virtue of owning shares in Target Corporation, she is not likely to be the one to decide on the propriety of Target Corporation's poison pill.)

To the extent that a system aspires to completeness, to including every person and every life situation, it sacrifices impartiality, the ability to find someone or something outside the system to serve as a meta-authority.[33] When we are dealing with the legal system, where everyone and every situation is ideally covered, no one and nothing are left to make decisions as to who the deciders should be or what they are permitted to decide. Rule of recognition? I do not remember enacting it, so we will pay no attention to it. Interpretive community? I have not seen the membership

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"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.

The King turned pale, and shut his notebook hastily. "Consider your verdict," he said to the jury, in a low, trembling voice.

The King justifies Rule Forty-two by reference to a meta-rule: A rule is valid if it has been in his notebook for an adequately long time. But Alice can use the oldest move in the book; she can undermine the King's argument from within by pointing out that the rule does not even satisfy the requirements of the King's own meta-rule. For a more recent effort in this vein, see Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

32. On the limits of rational discourse, see Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 38–39 (1984), but only if you already agree with him. If you do not, see Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986).

33. There is an analogy here to Gödel's Theorem, which proved that a mathematical/logical system cannot be both complete and consistent; that is, a system cannot contain both *all* true propositions and *only* true propositions. *See* K. GÖDEL, *On Formally Undecidable Propositions of* Principia Mathematica *and Related Systems* I (1931), in COLLECTED WORKS 145–95 (1986). Again, the analogy cannot be carried too far. *See supra* note 4.

I suspect that one of the great untold stories of legal history is the close correspondence between developments in legal thought and mathematical/logical thought in the late 19th and early 20th centuries. While the Langdellians were attempting to reformulate law as an organized group of propositions flowing from a small number of fundamental axioms, the exact same thing was occurring in mathematics, an effort which culminated in A.N. WHITEHEAD & B. RUSSELL, PRINCIPIA MATHEMATICA (1925–27). Gödel proved the impossibility of the project in 1931, at the same time as the Realists were debunking Langdell.

rules, so I cannot tell who is in and who is out. When the system aspires to include every rule and every decider, no rules or deciders remain above the system for us to jump to.

Even in simpler systems, the search for a meta-authority collapses under the weight of an infinite regress. Jake's mother may do for a while, but eventually Amy will contest her authority. The next-door neighbor will suffice to legitimate the authority of Jake's mother, but then we will need to find someone to justify *his* authority, and so on, until we have exhausted the population. Again, Amy and Jake (and Jake's mother, if necessary) recognize what will happen. Amy and Jake either work out their disputes (I decide this one, you decide the next one) or they limit themselves to an appeal up to only one level of meta-authority. Either way, the justification of authority cannot avoid self-reference.[34] Asked to justify a negotiated resolution, Amy and Jake can only say "We just agreed to it, that's all." Asked to justify her authority, Jake's mother can only say "Because I say so."

C. *Meta-directives*

Finally, the attempt to write a text's interpretation into the text also falls prey to an infinite regress. Section 2 of the California Evidence Code can be interpreted either strictly or liberally. Pretend we are the Legislature. To clear it up, we will write section 2A, which construes section 2 liberally. But now we have created a jobs program for legislative assistants, who will be called upon to draft section 2B, construing 2A; 2C, construing 2B; and all the rest.

When we jump out of the system, we try to write a meta-text which will comment on the base text. But when we splice together the text and the meta-text, the meta-text vanishes. We are back to only a base text—a slightly larger base text, but a base text all the same. No matter how much self-explanation we stuff into the text, no matter how much of a reader we try to place within the text, eventually it needs to be interpreted by a reader outside the text. This is the point at which the meta-directives lose their meta-ness, the point where they become no more persuasive than ordinary textual directives.

VI. Self-Reference

We have looked at three forms of authority: authority from rules, authority from people, and authority from texts. In each of its forms, attempts to justify authority by reference to a meta-system fail. When we try to jump to a meta-rule, to a meta-ruler, or to a meta-text, we land back in the system again. Justification of authority, whether by rule, person, or text, becomes inevitably self-referential.[35]

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34. Unless we justify authority by reference to a fiction, such as the "healthy confidence that somewhere in our system of beliefs there is a place of convergence, a consensus, so strong that we may successfully deputize fallible beings to calculate the single, optimal result that derives from our laws as well as our mores." George, *King Solomon's Judgment Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning*, 30 Hastings L.J. 1549, 1574 (1979).

35. *Cf.* Farago, *Judicial Cybernetics: The Effects of Self-Reference in Dworkin's Rights Thesis*, 14 Val. L. Rev. 371, 393 (1980) ("Judicial self-reference, the influence that the judiciary exerts on the theoretical model that it uncovers, is a critical aspect of the legal process . . . . Failing to [treat the common law as a self-referential system]

This should not come as any surprise. In simpler legal systems, where absolute authority resides in a person (such as a monarch) or a text (such as the Bible), we immediately recognize the self-reference inherent in any explanation of authority. Why does the King have authority? Because he's the King. Why must I rest on the Sabbath? Because it says so in the Bible.[36]

But in such a system, no one needs to ask these questions, because the answers are so much a part of the culture as to be almost inexpressible. (What would Mr. and Mrs. Citizen say when asked why we elect the President by popular vote?) In a self-governing system, on the other hand, we are continually facing the awkward problem of explaining why one person gets to tell another person what he can or cannot do. We must endlessly question the nature and legitimacy of authority. Baldly self-referential answers do not look like answers at all; we always try to explain by referring to something besides the authority itself.[37] Why can't I steal my neighbor's car? Because it's inefficient, because it's immoral, because it violates a law duly passed by an elected body. Why must I go where the judge tells me to go? Because it's one of our fundamental norms that judges can sometimes tell people where to go, because a rule underlying the system requires that we follow judges' instructions, because the judge was selected according to a fair procedure.

When you look closely, however, these justifications by reference to meta-systems are no less self-referential than justifications by reference to a monarch or a sacred text. When you ask "why?" enough times, you eventually get to a point at which the justification of authority cannot avoid self-reference.[38] Why can't I steal

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would permit us to simplify our task in a subtly fallacious way. It is easier to address the right answer hypothesis when the system against which we evaluate the 'rightness' of our answers is totally external to the system that generates them.").

Pierre Schlag has observed that legal language, like legal reasoning, can fall prey to self-reference. "Law and legal discourse (like other forms of symbolic activity) have a reflexive quality. In other words, the language we use in legal discourse to justify our positions, to state our goals, to announce our intentions has a tendency to circle back and alter the very statements we make." Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 959 (1988).

On self-reference regarding the relationship between legal and social change, see Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 248–50 (1983); Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 LAW & SOC'Y REV. 291 (1984); Teubner, *Evolution of Autopoietic Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 217–41 (G. Teubner ed. 1988).

On self-reference in general, see SELF-REFERENCE: REFLECTIONS ON REFLEXIVITY (S. Bartlett & P. Suber eds. 1987). The essay most relevant to law is Suber, *Logical Rudeness*, in *id.* at 41–67, discussing the ability of some forms of argument ("rude" arguments) to insulate themselves from attack.

36. Or else because the King and the Bible are only one step removed from the ultimate meta-authority. The King is King because he rules by divine right; the Bible is the Bible because it was written by God.

37. *See* Banner, *Please Don't Read the Title*, 50 OHIO ST. L.J. 243, 255 n.37 (1989), (containing, among other things, the world's first self-citing footnote, and observing that one self-citing footnote is plenty, as it will continue to cite itself indefinitely. Note 37 goes on to consider offering a prize for the first citation clever enough to send a Lexis machine into an infinite loop, but decides not to mention it.).

38. But cheer up—nihilism need not be depressing:

> If we feel we need to ground our beliefs in a way that will remove all doubts, and if such a firm ground is unavailable, we respond with either despair or apathy or cynicism. This way of thinking about moral choice is a mistake. The absence of secure foundations or decision procedures for belief should be experienced not as a void but as an opportunity. It is up to us to live in a way that can create commitments and communities.

Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 67 (1984).

For a striking visual display of the possibility of stability without secure grounding, see P. HUGHES, VICIOUS CIRCLES AND INFINITY (1975), at figure 15 (a photograph of a number of people seated in a circle, each of whose lap supports the person in front, and each sitting on the lap of the person behind). The analogy to the organization of society is obvious.

my neighbor's car? Because the law says I can't. Why must I listen to the judge? Because she's the judge. We are all constantly telling one another what to do; the question of why we set up systems of physical and economic compulsion in order to force ourselves to listen is one which does not admit of any legal-logical (as opposed to political) answer. The important question (which, ironically, does not appear in this story until its self-referential last sentence) is thus not why anyone gets to do any particular bit of telling; it is rather why the same sorts of people are always the ones who get to do most of the telling.